IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 259 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE D.H.WAGHELA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

1 to 5 NO

FAKIR RAMJUSHA IBRAHIMSHA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 259 of 2003

MR EE SAIYED for Petitioner No. 1

MR HL JANI APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE D.H.WAGHELA

Date of decision: 12/12/2003

C.A.V. JUDGEMENT

1. This appeal is preferred by the accused convicted in NDPS Case No.4 of 2002 by the judgment and order dated 25.2.2003 wherein the appellant is sentenced to rigorous

imprisonment for three years and fine of Rs.50,000/-, in default, further imprisonment for six months, for the offences punishable under section 20 (b) (i) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the Act').

2. The short facts of the case of the prosecution are that the appellant was found to be possessing in the house occupied by him 5 kgs. of ganja when, upon information, officers of A.T.S., Mehsana raided his home at around 22.20 hours on 7.9.2002. The contraband goods was found in a plastic bag kept below the bed and the contents thereof having turned out to be ganja, after weighing the goods and taking out two samples of 100 gms. each in presence of panchas, the appellant was arrested and a First Information Report (F.I.R.) was registered at Mehsana City Police Station as Prohibition C.R. No.301 of 202. The chargesheet was submitted on 17.10.2002 after completion of the investigation and the appellant having pleaded not guilty to the charges framed on 16.11.2002, evidence was led before the trial Court. The prosecution examined the Police Sub Inspector Mr.A.I.Patel as the complainant (Exh.8), Ratilal, a member of the raiding party (Exh.12), Jhala Jayanti R., the person who weighed the contraband goods (Exh.13), Ajwaji J.Thakore, panch witness (Exh.15) and the other police officers who carried the sample to the Forensic Science Laboratory (FSL) and carried out the investigation (Exhs.21, 23 and 25). The documentary evidence mainly consisted of the complaint dated 8.9.2002 (Exh.9), seizure memo (Exh.10), memo of weighment (Exh.14), panchnama dated 7.9.2002 (Exh.17), acknowledgment receipt of FSL dated 9.9.2002 (Exh.22), note dated 8.9.2002 recording delivery of sample to FSL (Exh.26), FSL report dt. 17.9.2002 (Exh.28) and note recording reasons for search between sunset and sunrise (Exh.29). During the course of proceedings before the trial Court, the application (Exh.36) of the appellant was allowed to afford him an opportunity to cross-examine the witnesses who were already examined and the application of the prosecution to examine the second panch witness was also allowed.

3. After appreciation of evidence and hearing arguments of the parties, the trial Court recorded findings to the effect that the contraband goods weighing 5 kgs., was found from possession of the appellant and, upon its analysis, it was found to be ganja. But consumption thereof having not been proved, the offence punishable under section 27 of the Act could not be made out. The contentions regarding violation of the

provisions of sections 41, 42, 50 and 55 of the Act were raised, as were raised in the present appeal, and are, after elaborate discussion, negatived by the trial Court. After convicting the appellant under section 20 (b) (i) for violation of the provisions of section 8 of the Act and after hearing the appellant on the issue of sentence, he was punished as mentioned hereinabove.

4. The evidence on record can be reconsidered as under in light of the contentions raised or reiterated in this appeal. The learned counsel for the appellant, Mr.E.E.Saiyed argued that the raid carried out at the premises of the appellant was illegal and in violation of the provisions of section 42 for being unauthorised and between sunset and sunrise. He submitted that the weight of the contraband goods was stated to be 3.5 kgs even by the witness Mr.Jhala, who weighed it and so deposed before the Court. He further submitted that there was no evidence to jump to the conclusion that the house from where the contraband goods was recovered belonged to the appellant. He further submitted that the search operation was conducted in violation of the provisions of section 50 of the Act and handling and delivery to the police station of the alleged contraband goods was in violation of the provisions of section 55. On the aspect of punishment, it was submitted that the petitioner was a sick and poor person, aged between 65 and 80, and had already undergone imprisonment for 14 months and, in such circumstances, a lenient view ought to be taken. As against that, learned A.P.P. Mr.Jani supported the judgment with the submission that none of the applicable provisions of law were violated as was contended for the appellant and that the extenuating circumstances were taken into consideration by the trial Court while imposing punishment for the serious offence having serious consequences for the society as a whole. The judgments cited and relied upon by the learned counsel are discussed hereinbelow along with the contentions.

5. Before considering the arguments of the learned counsel, it would be advantageous to refer to the scheme of the relevant provisions of the Act. Section 8 of the Act prohibits possession of any narcotic drug or psychotropic substance except as allowed under that section. Ganja is included in the definition of "cannabis (hemp)" which, in turn, is included in the definition of "narcotic drug". Section 20 prescribes that the contravention in relation to cannabis and possession thereof, in any quantity less than commercial quantity but greater than small quantity, is punishable by rigorous imprisonment for a term which may extend to

ten years and with fine which may extend to one lakh rupees. "Small quantity" and "commercial quantity" in relation to ganja are specified by the notification dated 19.10.2001 to be 1000 gms. and 20 kgs. respectively.

5.1 By the provisions of sub-section (2) of section 41, an officer of gazetted rank of the police department who is empowered in this behalf by general or special order of the State Government, may authorise any officer subordinate to him but superior in rank to a peon, sepoy or constable, to arrest a person if he has reason to believe that such person has committed an offence punishable under the Act as also authorise search of a building and he may also himself arrest such person or search a building. By virtue of section 42, such empowered officer may, between sunrise and sunset, enter into and search any building where he has reason to believe, from personal knowledge or information given by any person and taken down in writing, that any narcotic drug or psychotropic substance or controlled substance in respect of which an offence punishable under the Act has been committed, which is liable for seizure, is kept or concealed. Provided that, if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief. Where such officer takes down any information in writing under the said provision, or records grounds for his belief under the aforesaid proviso, he has to, within 72 hours, send a copy thereof to his immediate official superior. Section 50 prescribes conditions under which search of persons shall be conducted. The requirements of the provisions of section 50 of taking the person about to be searched to the nearest gazetted officer of any of the departments mentioned in section 42, or to the nearest magistrate, apply only in cases of personal search. Therefore, the requirement of proceeding to search the person as provided under section 100 of the Code of Criminal Procedure, when it is not possible to take the person to the nearest gazetted officer or magistrate without the possibility of his parting with possession of any narcotic drug, also arises only in case of search of a person. The requirements of sub-section (4) of section 100 of the Cr.P.C. of calling upon two or more independent and respectable inhabitants to attend and witness the search would, therefore, strictly apply in case of search of a person. By virtue of section 51, however, the provisions of the Cr.P.C. are applied,

insofar as they are not inconsistent with the provisions of the Act, to all warrants issued and arrests, searches and seizures made under the Act. Section 54 of the Act provides for a rebuttable presumption that the accused has committed an offence under the Act in respect of narcotic drug for the possession of which he fails to account satisfactorily. And, section 55 authorises an officer in charge of a police station to take charge of and keep in safe custody, pending the orders of the magistrate, all articles seized under the Act within the local area of that police station and which may be delivered to him, with a duty to allow any officer who may accompany such articles or who may be deputed for the purpose, to affix his own seal to such articles or to take samples of and from them with a further duty to seal the samples so taken with a seal of the officer in charge of the police station. It will have to be seen whether any of the aforesaid relevant provisions were violated in the facts of the present case.

6. Admittedly, the search and seizure operation on 7.9.2002 at about 2200 hours, between sunset and sunrise, was carried out by police sub inspector Mr.A.I.Patel, A.T.S., Mehsana, on the basis of the information received by him and the contraband goods was seized from under the bed on which the appellant sat. Therefore, the provisions of section 50 of the Act did not apply in the facts of the case. According to the secret note dated 7.9.2002, at Exh.31, the police sub inspector had reported to the Superintendent of Police, Mehsana that, according to the information received by him, the appellant had in his possession the contraband ganja and that it was necessary to carry out the search during night as the goods was likely to be removed for concealment if time was allowed to pass. Thus, not only the search and seizure are carried out by an officer empowered in that behalf, but the grounds for believing the search to be necessary between the sunset and sunrise are recorded and communicated to the immediate superior officer by the police sub inspector. Therefore, the contention of violation of the provisions of section 41 or section 42 of the Act during the search operation has to be negatived.

6.1 Reliance of the appellant on the judgment of the Andhra Pradesh High Court in VARADAPUREDDI SIMMANNA v. STATE OF ANDHRA PRADESH [1999 Cri.L.J. 2465] appears to be misplaced since, in the facts of that case, the requirement of recording reasons before undertaking search between sunset and sunrise was not complied with.

6.2 As for the contention regarding ownership and occupation by the appellant of the premises from which the contraband goods was seized, it was submitted by the learned A.P.P. that two electricity bills in the name of the appellant were seized from the same premises and were produced and proved as Exhs.34 and 35; although the address therein of the appellant was "Pan Cabin" of the same area, viz. "Amaliyapara". Having regard to the fact that the contraband goods was recovered from under the cot on which the appellant was sitting, the search was carried out after sunset and no defence as regards occupation of the premises was taken even in the statement recorded under section 313, it can safely be presumed that the premises and the contraband goods were, for the time being, in possession of the appellant. The presumption under section 54 of the Act mentioned hereinabove would be available to the Court in the facts of the present case, particularly when no attempt was made to disprove that the appellant was in possession of the premises and the narcotic drug.

6.3 Learned counsel Mr.Saiyyed relied upon the judgment of the Supreme Court in MOHD. ALAM KHAN v. NARCOTIC CONTROL BUREAU [AIR 1996 SC 3033] to submit that when no independent evidence was available to sustain the finding about possession or ownership of the premises by the appellant, the Court cannot come to a confirmed conclusion regarding ownership and possession on the basis of oral statements of the witnesses. In the facts of that case, search was conducted when the appellant was being interrogated by the Narcotic Control Bureau officials and the premises in question was, at the time of search, under lock and key. The relation between the accused and the premises was sought to be established only on the basis of the statement of the accused himself, which statement also was retracted at the first opportunity. Whereas in the facts of the present case the contraband goods were seized from the immediate vicinity of the accused person and, therefore, the question of ownership or continued possession of the premises by the accused receded into background.

6.4 The reliance on the judgment of the Madhya Pradesh High Court in KALEKHAN v. STATE OF M.P. [1990 Cri.L.J. 1119] also appears to be misplaced since, in the facts of that case, there was absolutely no evidence on record to show that the accused car owner knowingly permitted his car to be used for concealing and carrying opium and the conviction was based on the statement recorded under section 313 of the Cr.P.C.

7. The next issue raised for the appellant was in respect of proof of possession of the goods weighing 5 kgs. The seizure of ganja, weighing 5 kgs. at the time of search, was sought to be proved by depositions of two witnesses, namely, A.I.Patel (Exh.8) and Ratilal (Exh.12), supported by the documentary evidence of seizure memo written and signed at the same time and spot by two panch witnesses. However, Mr.Jhala Jayanti R. (Exh.13), who was called with the scales to weigh the seized ganja, deposed in his examination-in-chief that it weighed approximately 3.5 kgs. although the note signed by him (Exh.14) certified the weight to have been 5 kgs. Thereafter, he as well as the panch witness Ajwaji J. Thakore (Exh.15) turned hostile in their cross-examination and denied their own version recorded in the examination-in-chief. The other panch witness, namely, Chandrasinh Natubhai (Exh.39), denied all the contents of the panchnama at Exh.17 in the examination-in-chief itself even as his signature on Exh.17 was admitted. Thus, in short, the evidence on oath before the Court was shaken as far as the witnesses other than the staff of the police were concerned. It was on that basis submitted that the independent witnesses having not supported the case of the prosecution, it was doubtful whether the contraband goods weighing 5 kgs. was found in and seized from the possession of the appellant. It must be noted that no allegation or suggestion was made to the witnesses who stood by the version of the prosecution to create a doubt about the credibility of the witnesses or to attribute any motives. In such circumstances, the unshaken and trustworthy deposition of the two witnesses and the documents admittedly signed by the witnesses and the version given by at least one panch witness in his examination-in-chief have to be weighed against the contradiction arising from the general denials coming from the so-called independent witnesses. And it has to be examined in the surrounding circumstances of immediate actions of the raiding party, the physical presence of muddamal, its delivery at the police station, sending of samples to the FSL and the report of the FSL to the effect that the sample was ganja, a contraband narcotic drug. It is well settled that the testimony of a witness is not to be doubted or looked upon with suspicion merely because he happens to be a police official except where corroboration by independent witnesses are required in the context of time, place and circumstances of the incident under scrutiny. As held by the Mumbai High Curt in NIRANJAN I JOSHI v. STATE OF MAHARASHTRA [1994 Cr.L.J. 300], if the material before the trial Court fully and completely established commission of offences

punishable under section 8 (3) read with section 21 of the NDPS Act, the Court would be justified in recording conviction even where panchas had turned hostile. This Court has also, in SAIYED MD SAYYAD UMRA [1995 Cr.L.R. (Guj.) 66, held that judicial pragmatism warrants that if the police officer is otherwise found to be quite dependable, then merely because panchas do not support, that should not be mechanically made a ground to discard his evidence. In that view of the matter, after careful scrutiny of the evidence of the police officers and in absence of any material contradiction in their testimony or attribution of motives, the conviction recorded on the basis of their evidence has to be upheld.

8. The other contention regarding violation of the provisions of section 55 of the Act has to be stated only to be rejected. It was argued for the appellant that the samples collected for analysis by the FSL were sent in sealed bags which were forwarded with a note and specimen of the seal affixed on the sample; but a seal of the officer in charge of the police station where the samples were deposited was not there on the note. On that basis it was submitted that the mandatory requirement of sealing the sample with a seal of the officer in charge of the police station was violated and, therefore, it cannot be concluded that the samples sent to the FSL were the same as were taken during the seizure. Section 55 of the Act requires an officer in charge of the police station to take charge of and keep in safe custody the articles seized under the Act. Such officer is required to allow the officer accompanying such articles to affix his seal to such articles as also to allow taking samples of and from them. When such samples are taken while the officer in charge of the police station takes charge of the articles, the samples so taken are also required to be sealed with a seal of the officer in charge of the police station. In the facts of the present case, the samples have been taken before and, therefore, the question of applying the seal of the officer in charge of the police station did not arise. This view is supported by the judgments of this Court in SALIMUDDIN @ JUGAN N. ANSARI v. STATE OF GUJARAT [1999 (3) GLR 2581] and RAVISHANKAR BHAGWATIPRASAD MISHRA v. STATE OF GUJARAT [2000 (1) GLR 137].

9. In the above facts and circumstances, the legal requirements under the Act for search, seizure and analysis are found to have been substantially complied with.

10. Having heard the learned counsel and gone through

the evidence in its entirely, no reason has emerged to interfere with the conviction of the appellant. As for the sentence, the facts and contentions regarding old-age, sickness, poverty and other personal circumstances, including the weight of the contraband goods, appeared to have been properly considered by the trial Court and, keeping them in view, the punishment of imprisonment for three years and fine of Rs.50,000/appeared to have been properly imposed. Even as the contention of the appellant having been caught and convicted for the first time at an advanced age was repeatedly emphasised, no reason was made out to take a more lenient view.

11. In the result, the appeal fails and the same is accordingly dismissed with the remarks that appropriate proceedings ought to be taken by the trial Court in cases where the so-called independent panch witnesses blatantly turn hostile virtually mocking at the oath taken in the witness box and the investigating officer ought to trace the sources from which such contraband goods having serious consequences for the society were brought. While dealing with a similar situation, this Court (Coram: M.S.Parikh & H.R.Shelat, JJ.), in the case of R.B.MISHRA (supra), had issued directions to the investigating agencies, police authorities etc. to properly and rigorously investigate into the offences related to drug and narcotic substances and to unfold the whole racket/chain involved in drug offences so as to release the society from their evil clutches. It can be hoped that the authorities concerned would be guided by the above directions while discharging their duties.

Sd/-

(D.H.Waghela,J.)

(KMG Thilake)